NO. 82-142

Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURRAY NEWMAN AND CAPITOL MOTORS, INC.,
Petitioners,

v.

HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. KATZ
Of Counsel
A MEMBER OF THE BAR OF THE
UNITED STATES SUPREME COURT
LUBIN AND KATZ
Attorneys for Petitioners
137-28 Northern Blvd.
Flushing, N.Y. 11354
(212) FL 3-2250

Dick Bailey Printers 290 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTION PRESENTED

Did the District Court Judge overstep the judicial powers vested in his office under Article III of the United States Constitution and the implementing legislation thereto, when upon his own motion he ruled:

> As the subpoena duces tecum is directed to one other than the petitioner and the petitioner does not claim any personal right or privilege with regard to the materials at issue, the petitioner lacks standing to contest the bank's amenability to compulsory process of this court. *Brown v. Braddick,* 595 F.2d 691, 697 (5th Cir. 1979). *Accordingly, the instant petition is hereby overruled and denied.* However, inasmuch as the instant subpoena duces tecum is a trial subpoena *United States v. International Business Machines Corporation,* 71 FRD 88 (S.D.N.Y. 1976), it is invalid due to the fact that it was issued by the clerk of this court for an action currently pending before the District Court for the Southern District of New York, Fed.R.Civ. P. 45(e). Accordingly the court hereby quashes the subpoena duces tecum served on the Trust Company Bank, sua sponte. (Order of Respondent annexed as Appendix B to the petition) (emphasis ours)

(The petition referred to in the aforecited decision was filed by one Murray M. Silver. This petition, filed under the ALL WRITS STATUTE, 28 U.S.C. section 1651, before the Respondent, sought to enjoin a bank from producing specific bank records of Murray A. Silver for use in the underlying New York Federal action); (copy of subpoena duces tecum is annexed as Appendix C).

NOTE: Trust Company Bank, 250 Piedmont Road, Atlanta, Georgia was served with the original summons. There are no other parties to the actions other than those appearing in the caption.

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HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Eleventh Circuit entered in the above case on the 21st day of April 1982.

OPINION BELOW

The Court of Appeals for the Eleventh Circuit denied the writ mandamus which sought to review the order below made and entered by the District Court for the Northern District of Georgia (Tidwell, J.). The writ was summarily denied without opinion. The order or judgment as

filed on the 21st day of April 1982 is reproduced in Appendix A to this petition.

JURISDICTION

The final order denying the writ mandamus was filed on the 21st day of April 1982 (Appendix A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rules 17 and 19 of the United States Supreme Court Rules. More particularly, petitioners cite the Court to Rule 171(a) contending that the summary determination of the writ mandamus by the Circuit Court:

> " . . . sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

(It should be noted that this determination was reached without requiring Respondent to file responsive papers in the Court below.)

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

I. Constitution of the United States, Article 3, Section 1:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

II. United States Code, Title 28, Section 1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

III. United States Code, Title 28, Rules 45(d)(1) and (e)(1):

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made,

the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(e) Subpoena for a hearing or trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

STATEMENT OF FACTS

In March 1982 there was pending in the Southern District of New York before the Hon. Robert W. Sweet, a Judge of that Court, the action of:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

80 Civ. 1775 (RWS)

MURRAY NEWMAN AND CAPITOL MOTORS INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LiBUTTI, a/k/a ROBERT PRESTI,
Defendants.

The aforecited non-jury trial commenced on January 13, 1982 and was still in progress when Respondent quashed the subpoena duces tecum on March 16, 1982 with the defendant Murray M. Silver scheduled to resume testimony on March 17, 1982.

It is not the purpose of this petition to dwell on the dispute that has been already tried and now awaits decision in the Southern District of New York. (Petitioners annex as Appendix D the pleadings of the New York action which indicate that the subject claims involved the nature of legal representation accorded to the petitioners in a prior cause wherein the said Murray M. Silver appeared as attorney for the petitioners.)

However, it is necessary for this Court in evaluating the proceedings before the Respondent Court to be afforded proper background as relates to the matter of the subject subpoena duces tecum (Appendix C).

However, it is necessary for this Court in evaluating the proceedings before the Respondent Court to be afforded proper background as relates to the matter of the subject subpoena duces tecum (Appendix C).

Prior to the commencement of the New York trial counsel for Murray M. Silver and counsel for the petitioners herein had arrived at an agreement which had been memoralized in Petitioners' Attorneys' letter of January 8, 1982. This letter reads as follows:

LUBIN & KATZ
ATTORNEYS AT LAW

January 11, 1982

Daniel Greenberg, Esq.
122 East 42nd Street
New York, New York 10017

Re: Newman v. Silver et al, 80 Civ. 1775 (RWS)

Dear Mr. Greenberg:

This letter will confirm our telephonic conversation of the morning of January 8, 1982 wherein you agreed to have the defendant Murray M. Silver produce at the trial the following:

1—Bank statements on Account (03-54-89-2).
2—Cancelled checks on Account (03-54-85-2) covering July and August 1978.

3—Bank statements on Escrow Account (01-83-93-2).
4—Cancelled check on Escrow Account (01-83-96-2) July and August 1978.

This will further confirm that you raised with me the problem of attorney-client privilege as to escrow funds of other clients.

Please accept this letter in lieu of a more formal notice to produce.

Very truly yours,

LUBIN & KATZ

By [signed] Robert A. Katz

[Appendix E to this Petition]

Then in the midst of trial and on January 19, 1982, defense counsel repudiated the agreement thus necessitating the issuance of subpoenas.

At this point of the trial and on or about January 20, 1982 the trial judge in New York issued a blanket subpoena directed at Murray M. Silver in the following terms:

> Judge Sweet (in robing room): This is to be deemed a subpoena Mr. Greenberg; anything that he has. He now does testify he has FBI notes. Anything he has relating to this case should be produced. (Tr. 921)
>
> [Appendix F]

In response to the foregoing, the defendant Murray M. Silver in mid-February produced the bank statements of the Trust Company Bank of Atlanta, Georgia wherein Mr. Silver maintained the subject accounts. However, when requested to produce the cancelled checks on the

bank accounts, defense counsel for Silver informed the trial court that such checks were lost and unavailable.

It is at this point that petitioners retained Georgia counsel to pursue the cancelled checks. Petitioners' Georgia counsel served a subpoena duces tecum upon the Trust Company Bank, a witness who will in no way contest the subpoena. However, defense counsel for Murray M. Silver, knowing full well that petitioners are scheduled to continue examination of Murray M. Silver in New York on March 17, 1982, filed a writ under 28 U.S.C. Sec. 1651(a) to ban the Bank from compliance. It is that writ which Respondent dismissed for lack of standing, at which time he also quashed the subpoena on his own motion. (Appendix B).

Thereafter, petitioners sought to review the order of Respondent pursuant to Rule 21(a) of the Federal Rules of Appellate Procedure. The Eleventh Circuit denied the petition for mandamus and petitioners now seek review of that denial before this Honorable Court (Appendix G).

(The Court is requested to note that on June 2, 1982 the Court of Appeals, Eleventh Circuit, also dismissed the appeal on a motion to dismiss filed by Murray M. Silver.)

REASONS FOR GRANTING THE WRIT

Petitioners fully appreciate that requesting review of the conduct of Respondent by petition for mandamus is not viewed with favor:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . As extraordinary remedies, they are reserved for really extraordinary causes."
>
> [Exparte Fahey, 332 U.S. 258, 259]

It is, however, respectfully argued by petitioners that the conduct of the Respondent Judge in quashing the subpoena pro forma upon his determination that the defendant in the New York action attorney Murray M. Silver had no standing to contest the subpoena, was an act in excess of the District Court's jurisdiction and, therefore, it should have been reviewed by Writ Mandamus which is the manner in which Appellate Courts seek . . .

> to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.
>
> [*Will v. United States,* 389 U.S. 90, 95]

There is no question but that this Court has the power to review a denial of mandamus as it relates to the conduct of Respondent. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21; *Bankers Life and Casualty Co. v. Holland,* 346 U.S. 379, 382-383; *Schlagenhauf v. Holden,* 379 U.S. 104; *DeBeers Consolidated Mines v. United States,* 325 U.S. 212.

In requesting that this Court grant such review, petitioners request that this Court examine the Petition for Mandamus (Appendix G) so that it will be clear upon the record that Respondent knew the following facts when he elected on his own motion to quash the subpoena:

1. That a subpoena had been issued by the trial judge directing that the subject bank records be produced by Murray M. Silver in the New York action.

2. That Murray M. Silver on January 25, 1982 . . . informed the court that the petitioner [Murray M. Silver] could not locate the records because his [unidentified] accountant had "lost" said records. (Appendix G).

3. That the New York Federal Court on or about February 26, 1982 adjourned the trial until March 17, 1982 to afford the plaintiffs in the New York action an opportunity to serve a subpoena duces tecum upon Trust Company Bank and to arrange for Georgia counsel to do so. (See order of Respondent Tidwell, Appendix B, page 1.)

4. That attorney Murray M. Silver of Atlanta, Georgia having informed the New York Court that the subject cancelled checks were unavailable and lost then brought a writ pursuant to 28 U.S.C. 1651 seeking to enjoin the Trust Company Bank from producing the subject cancelled checks (see order Respondent Tidwell, Appendix B).

If there was reason to quash the subpoena duces tecum in the circumstances herein outlined those reasons did not mandate the Court's interference on its own motion to correct form. it could be argued by Respondent that the subpoena duces tecum should have been secured under Rule 45(d) instead of Rule 45(e) and that such necessitated the taking of an identifying deposition. Peti-

tioners' response to such argument is to ask the Court to focuse on the fact that the documents sought were Murray M. Silver's checks and if they had been produced Murray M. Silver would have been the proper identifying witness of his own checks at the resumed trial on March 17, 1982.

In these circumstances the Court's intervention on a hypertechnical objection to form where the movant Murray M. Silver was found to have no standing to protest was a clear abuse of discretion and an exercise of power which does not compont with the role of independent arbiter and mandamus should have issued from the Eleventh Circuit to correct Respondent's conduct and unwarranted interference.

CONCLUSION

Petitioners pray that the petition for a writ of certiorari be granted.

ROBERT A. KATZ
Of Counsel
A MEMBER OF THE BAR OF THE
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LUBIN AND KATZ
137-28 Northern Blvd.
Flushing, N.Y. 11351
(212) FL 3-2250

Attorneys for Petitioners